

**IN THE MATTER OF AN ARBITRATION UNDER CHAPTER ELEVEN OF
THE NORTH AMERICAN FREE TRADE AGREEMENT
AND THE UNCITRAL ARBITRATION RULES**

BETWEEN:

**WILLIAM RALPH CLAYTON, WILLIAM RICHARD CLAYTON, DOUGLAS
CLAYTON AND DANIEL CLAYTON AND BILCON OF DELAWARE INC.**

Claimants

AND:

GOVERNMENT OF CANADA

Respondent

SECOND AFFIDAVIT OF STEPHEN CHAPMAN

I, STEPHEN CHAPMAN of the City of Ottawa, MAKE OATH AND SAY AS
FOLLOWS:

1. I have reviewed the Reply Memorial submitted by the Claimants, as well as the Supplemental Witness Statement of Mr. Paul Buxton, the Reply Expert Report of Mr. David Estrin and the Expert Report of Mr. T. Murray Rankin, for the purposes of preparing this Affidavit. In light of a number of the statements made in these submissions, I also re-reviewed my first Affidavit, which I swore on December 2, 2011. I reaffirm my previous testimony, and will not repeat it here. I file this second Affidavit in order to provide additional information and to correct certain inaccuracies with respect to two topics: the discussion of set-back distances with Nova Stone Exporters Inc. (Nova Stone) after the referral of the Whites Point Quarry and Marine Terminal to a panel review, and the manner in which Global Quarry Products (GQP) was informed that the

environmental assessment (EA) of the Whites Point Quarry and Marine Terminal had been referred to a review panel.

A. Discussions with Nova Stone Regarding Blasting Set-Backs After the Request for a Referral to a Review Panel

2. As I explained in my first Affidavit, the Minister of Fisheries and Oceans referred the EA of the Whites Point Quarry and Marine Terminal to the Minister of the Environment for referral to a review panel on June 26, 2003. Once the Minister of Fisheries and Oceans made this referral, the Canadian Environmental Assessment Agency (the Agency) became responsible for the management of the EA.¹

3. Before the referral was made, I understand that officials of the Department of Fisheries and Oceans (DFO) were in communication with Nova Stone concerning proposed blasting on a 3.9ha quarry for which Nova Stone had obtained a conditional approval from the Nova Scotia Department of Environment and Labour (NSDEL) in April of 2002. The conditions imposed by NSDEL in the approval required DFO officials to confirm that the blasting on this 3.9ha area was in accordance with DFO's blasting guidelines and that it would not adversely affect marine mammals.² As a result, I understand that the communications between DFO and Nova Stone involved the distance that the blasting would have to be set back from the shore line in order to protect marine life. On May 29, 2003, DFO wrote to Nova Stone both with some recommendations as to how the blasting could conform to DFO's blasting guidelines, including proposed set-back distances, and with questions about the purpose of Nova Stone's activities.³

4. After the Minister of Fisheries and Oceans referred the project proposed by GQP for referral to a review panel, my understanding is that DFO officials received new advice from internal experts that suggested that the setback distances originally provided to Nova Stone were too conservative. Since the Agency was now responsible for the management of the EA of the Whites Point Quarry and Marine Terminal, DFO officials

¹ First Affidavit of Stephen Chapman, ¶¶ 25-42.

² Nova Stone Approval, April 30, 2002, **Exhibit R-87**.

³ Letter from Phil Zamora to Paul Buxton, May 29, 2003, **Exhibit R-55**. *See also*, letter from Phil Zamora to Paul Buxton, June 11, 2003, **Exhibit R-524**.

approached us to seek advice as to whether it would be appropriate, in these circumstances, to share this new information with Nova Stone.

5. At the time, there were still questions within the Agency on two key points: the intended purpose of the blasting on the 3.9ha quarry and whether the 3.9ha quarry was a distinct project from the Whites Point Quarry and Marine Terminal project that had been proposed by GQP.

6. With respect to the first point, in the project descriptions that had been submitted by GQP for the Whites Point Quarry and Marine Terminal, the blasting on this 3.9ha quarry appeared to be described as test blasting for the purpose of generating data for the EA of the larger project.⁴ As the Whites Point Quarry and Marine Terminal project was to be assessed by a review panel, the Agency was of the view that the review panel should be aware of any proposal to carry out test blasting before it happened. Moreover, the Agency was of the opinion that the review panel should have the opportunity to comment on whether or not the information that could be generated by test blasting was needed for the EA.

7. With respect to the second point, if Nova Stone's project was really just a component of the larger Whites Point Quarry and Marine Terminal project proposed by GQP, then for DFO to take action which could lead to the development of that part of the project would be contrary to the purposes, if not the letter, of the *Canadian Environmental Assessment Act* (the *CEAA*). Indeed, s. 4(a) of the *CEAA* provides that one of its purposes is to “ensure that the environmental effects of projects receive careful consideration before responsible authorities take actions in connection with them.”⁵ (emphasis added). The Agency felt strongly that it was not acceptable for a proponent to avoid the *CEAA* through a corporate shell game in which a nominally different corporate entity developed an aspect of the project before the EA of the whole project was complete.

⁴ Letter from Paul Buxton to Derek MacDonald, copied to Christopher Daly, attaching third project description, March 10, 2003, **Exhibit R-181**.

⁵ *Canadian Environmental Assessment Act*, s. 4(a), **Exhibit R-1**.

8. As a result, in the summer of 2003, after discussion amongst senior officials at the Agency, we recommended that DFO not engage in discussions with Nova Stone regarding proposed blasting on the 3.9ha quarry until it was determined through the finalization of the JRP Agreement whether this 3.9ha quarry was to be assessed as part of the EA of the Whites Point Quarry and Marine Terminal.⁶

9. I recall that the Agency initially had some questions about whether the 3.9ha quarry should be included in the scope of that EA, primarily because of the different proponents and our lack of understanding of the relationship between them. In fact, the draft JRP Agreement that was issued for public comment on August 11, 2003 reflected only GQP and the specific project it proposed.⁷ For its part, DFO was of the view that Nova Stone's "project" was in fact indistinct from GQP's project, explaining to me that the 3.9ha quarry was wholly encompassed by the larger quarry, and also that the environmental effects of both "projects" were expected to be the same. DFO also indicated that it had determined the 3.9 ha quarry would likely require a s. 32 authorization under the *Fisheries Act*.⁸ This determination would have required the 3.9ha quarry to undergo an EA under the *CEAA*. NSDEL also advised me that in its view, the 3.9ha quarry should be included in the scope of the EA.⁹

10. In addition, as noted above, the Agency considered the fact that Nova Stone's project was included in the project description for the Whites Point Quarry and Marine Terminal. We were also aware that Mr. Paul Buxton, who was the manager and contact for both projects, appeared to have taken the position that the 3.9ha quarry was part of the larger project in his dealings with the Community Liaison Committee established with respect to the 3.9ha quarry.¹⁰ Given all of these considerations, the Agency ultimately determined that the 3.9ha quarry project being proposed by Nova Stone should be scoped into the EA of the project being proposed by GQP. In this light, the Agency specifically

⁶ See email from Phil Zamora to Bruce Hood, August 5, 2003, **Exhibit R-525**.

⁷ Draft JRP Agreement, August 11, 2003, **R-278**.

⁸ Letter from Phil Zamora to Stephen Chapman, September 17, 2003, **Exhibit R-526**.

⁹ Email from Cheryl Benjamin to Stephen Chapman, September 17, 2003, **Exhibit R-527**.

¹⁰ See for example, Community Liaison Community Minutes, p. 145, **Exhibit R-299**.

advised DFO that it should respond to Nova Stone only after a JRP Agreement was finalized. The response was to be limited to simply advising Nova Stone that because the matter had been referred to a JRP, it was inappropriate for DFO to comment any more.¹¹ Further, the JRP Agreement was redrafted to reflect the conclusion that the projects were being treated as a single project.¹²

11. The JRP Agreement was to be finalized in early 2004; however, as I explained in my first Affidavit, GQP asked that its release be delayed pending a corporate restructuring.¹³ Then, in August 2004, we were notified that Nova Stone had ceased to have a role in the project and that the conditional approval for the 3.9ha quarry was now null and void.¹⁴ As a result, there was no longer any concern that DFO sharing its revised calculations for setback distances would lead to blasting on a project subject to an EA. We advised DFO that in this light they were free to release this information once the JRP Agreement was finalized and a review panel was in place. That occurred on November 3, 2004, and the JRP was publicly announced on November 5, 2004.¹⁵ I understand that DFO wrote to Bilcon with the new setback information on November 12, 2004.¹⁶

B. The Public Release of the Decision to Refer the EA of the Whites Point Quarry and Marine Terminal to a Joint Review Panel

12. When the Minister of Fisheries and Oceans referred the EA of the Whites Point Quarry and Marine Terminal project to the Minister of the Environment for referral to a

¹¹ See email from Phil Zamora to Stephen Chapman, September 3, 2003, attaching draft letter from Phil Zamora to Paul Buxton, August 29, 2003, which Mr. Zamora prepared after discussing with me the concerns that the Agency had over DFO discussing the issue of blasting set-backs with Nova Stone, **Exhibit R-528**. See also notes of Cheryl Benjamin's meeting with Stephen Chapman, August 28, 2003, **Exhibit R-521**.

¹² Email from John Crépault to Chris Daly and Cheryl Benjamin, November 10, 2003, attaching Draft Agreement for the Establishment of a Joint Review Panel, **Exhibit R-530**.

¹³ First Affidavit of Stephen Chapman, ¶¶ 33-35.

¹⁴ First Affidavit of Stephen Chapman, ¶ 36. See also letter from Paul Buxton to Jean Crépault, August 13, 2004, **Exhibit R-93**, and letter from Paul Buxton to Jean Crépault, August 17, 2004, **Exhibit R-94**.

¹⁵ See JRP Agreement, **Exhibit R-27**, and Joint Canada-Nova Scotia News Release – Canada and Nova Scotia Establish Joint Review Panel for the Whites Point Quarry and Marine Terminal Project, November 5, 2004, **Exhibit R-235**.

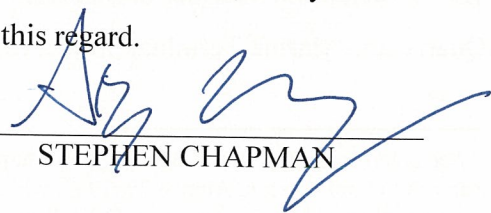
¹⁶ Email from Phil Zamora to Paul Buxton attaching letter containing setback information, November 12, 2004, **Exhibit R-531**.

review panel, he issued a public news release describing his decision. He also made his letter to the Minister of the Environment publicly available. The news release and the contents of the letter were reported on in the Halifax Herald on July 3, 2003.¹⁷ In 2003, it was not typical for such referrals to be made public, and as such, GQP and the public were both given more information about the fact that this project was to be considered by a review panel than were other proponents.

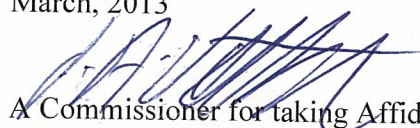
13. Of course, at the time that Minister Thibault issued his news release, it still was not clear whether the review panel would be a *CEAA* only review panel or a JRP. That decision was not made until early August, when the provincial Minister and the federal Minister of the Environment both signed off on the terms of a draft JRP Agreement.¹⁸ Consistent with Agency practice, this JRP Agreement was announced via public news release on August 11, 2003.¹⁹ Further, as discussed in my first Affidavit, I met with GQP on August 29, 2003 to discuss the referral and the EA process.²⁰

14. In several places, the Claimants and Mr. Buxton seem to take issue with the fact that they did not receive an advance courtesy call ahead of the public release of the agreement to have the EA conducted by a JRP.²¹ At the time of the referral of the Whites Point Quarry and Marine Terminal EA to a JRP, the Agency did not give proponents such advance notice or make such courtesy calls. GQP was treated no differently than were the proponents of other contemporaneous projects in this regard.

SWORN BEFORE ME at Ottawa)
 Ontario, Canada this 19 day of)
 March, 2013)



 STEPHEN CHAPMAN


 A Commissioner for taking Affidavits
 in and for Ottawa, Ontario, Canada

¹⁷ Brian Medel, *Thibault Calls for Full Review of Digby Neck Quarry Plans*, Halifax Herald, July 3, 2003, **Exhibit R-532**.

¹⁸ See ¶ 29 of my first Affidavit.

¹⁹ See News Release, Whites Point Quarry and Marine Terminal: Draft Agreement Released for Public Comment on Joint Environmental Assessment Review Panel Process, August 11, 2003, **Exhibit R-226**.

²⁰ First Affidavit of Stephen Chapman, ¶ 30.

²¹ See Claimants' Reply, ¶ 79(a) and Supplemental Witness Statement of Paul Buxton, ¶ 26(a).